



Luncheon Speech: Better Sixty Years of Tyranny than One Night of Anarchy

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Luncheon Speech: Better Sixty Years of Tyranny Than One Night of Anarchy

NOAH FELDMAN*

I'm really honored to be invited by you and by the rest of the International Law Review, and excited to be with all of you here today. It's very, very daunting to appear to speak after you've just heard your teachers, your senior colleagues, your elders and betters in every respect, speak on the topic. So I'm going to try to make my remarks in some way a bridge between the morning panel and the afternoon panels. I will try to talk a little bit about realities in Iraq and how they've developed; to talk a little bit about some philosophical ideas, and how they might be connected to that. I even want to suggest that some of our problems that we've faced in Iraq so far are actually the product of a philosophical view held, all unknowingly, by members of the U.S. government in the run-up to our difficulties in Iraq. Apologies to all in advance if I fall down on the job in any of these regards.

I'm going to start with an Arabic adage that can be found at least in the Middle Ages. You can find it in the writing of Ibn Taymiyya, but it's pretty clear that he's already quoting something much older. And this phrase goes like this: "Better sixty years of tyranny than one night of anarchy." It's a strong formulation, and it's usually quoted by Western writers speaking about the Islamic political tradition to emphasize the claim, which I think is not quite right, that the Muslim political tradition wasn't that worried about how bad tyranny was. I think that's exactly backwards, and I think we see this much more clearly after what we've gone through in Iraq. I think the point of the phrase is to tell you just how bad anarchy actually is. The suggestion is that even one night—and it's significant that in at least some versions of the adage it's the nights,

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when there's no one in charge—even one night of the removal of authority can bring about the utter destruction of political society as we know it. It's that adage that I want to take as my inspiration for my comments today. Not that I want to suggest to you that I agree with it; just that it's an interesting basis for reflection on the thoughts that I'm going to discuss.

That night of anarchy, or rather that several weeks of anarchy, actually came to Iraq in 2003. It came in the wake of the U.S. bombing and the U.S. march on Baghdad that had the effect of toppling Saddam's government before there were enough U.S. troops on the ground to exert effective control over the city. This happened to a lesser degree elsewhere in the country. Indeed, even had the United States wanted to pretend—and I think it could have pretended that it had enough troops to control the city—it didn't try. The extraordinary degree of looting that resulted was disastrous on two levels. It was disastrous at the practical level; the utter destruction of almost every major government structure in the country. I was struck when Professor Waldron¹ was quoting the passage in O'Donovan's book about the destruction of the Ministry of Justice. Ambassador Istrabadi² and I know that although the Ministry of Justice wasn't untouched by the attacks, it was never directly bombed. The image that O'Donovan is talking about is actually of what the Ministry of Justice looked like after it had been looted. After the looters were finished with the Ministry of Justice—which took a couple of hours—there was not a document left in the building; not a stick of furniture left in the building. Anything that wasn't of use was thrown into the courtyard in the center of the building from the top ten stories and burned there. Nothing effectively remaining of the building. Of course, most important, the human capital, the employees were gone, and they were never coming back. This was practically disastrous I said. That was the first problem.

The second problem—and in some ways even worse problem—was that the occupying forces sent the message to the people of Baghdad, and by extension the people of the whole

1. Professor Jeremy Waldron, University Professor, New York University School of Law, was a panelist on Panel One, "Moral Obligations of an Occupier to the Occupied." Symposium, *Transformation in Iraq: From Ending a Modern War to Creating a Modern Peace*, 31 LOY. L.A. INT'L & COMP. L. REV. <> (<>).

2. Ambassador Feisal Amin Rasoul Istrabadi served as Iraq's Ambassador and Deputy Permanent Representative to the United Nations from 2004 to 2007. Ambassador Istrabadi was a panelist on Panel Three, "Practical Realities: Exiting Iraq." *Id.*

country, that nobody was in charge. We announced anarchy. Hard to pull that off actually in the world, but we did it. Iraqis were for the most part, those in Baghdad, stunned by this. Many people said to me . . . one old man in particular who remembered the coups which were frequent in the 1950s and 1960s—the 60s in particular—said to me, “You know everyone is a little mystified. We remember that when there’s a coup, someone appears on the radio and says, ‘My name is General so-and-so and I’m in charge. Do not leave your homes or you will be shot.’ And then a couple of days later the same voice would come on—probably the same voice—and say, ‘I’m still General so-and-so, go back to work or you’ll be shot.’” And he said, “That was sort of the way we did things and nobody’s telling us who’s in charge at all. There’s been no effort to communicate any sense of who’s in charge.” Now allowing a little bit for the heat of the moment I think there’s a deep observation there, which is that the failure to even assert authority announces to ordinary people that in fact nobody’s in charge.

So that’s the first framing moment, and now I want to turn to the situation as it stands. The situation is that, formally, as a matter of international law, the United States is no longer the occupier of Iraq. There was a lot of discussion in this morning’s panel about the United States as an occupying force, and I think as a matter of fact that remains true. As a matter of fact there’s still upwards of one hundred fifty thousand U.S. troops on the ground, and the Prime Minister is limited to some degree in what he can do by the presence of the United States. Many other things limit him too, which I’ll be talking about, but legally speaking the United States is not the occupier. Legally speaking there is a sovereign Iraqi government. And it’s the position of the U.S. government—true or false is a separate question—but it’s the position of the U.S. government that if the elected Iraqi government asked the United States to leave, that we *would* leave. And as things have gotten worse and worse in Iraq, I’ve occasionally thought that the U.S. government is sort of hoping that the Iraqi government will say, “please leave.” Because that would be the one way to justify withdrawal. The truth is that the Iraqi political institutions that exist, and they’re vexed in many ways, are in some important way representative of the Iraqi people. They’ve been elected, not just through one, but through a series of elections. One ratified a constitutional structure. The group of people who put forward that

constitutional structure were themselves elected in a national referendum. Then there was further national election under the terms of the constitution. So there have already been several important electoral events in Iraq. The government does in some sense speak on behalf of some entity that could be labeled the Iraqi people.

And yet—and here's what's so interesting about this—despite the *de facto* occupation and the existence of an Iraqi government that asserts sovereign authority, there exists across the country a range of militias on a range of different sides, who themselves exercise tremendous power and effect in the country based on their ability to use force. We've just seen this in the last ten days in the southern city of Basra where the government sought to fight a military action against one of the most powerful militias in the country, the Jaish al-Mahdi, the Mahdi Army, which is associated with Muqtada al-Sadr. The government then had to sue for peace, essentially with Sadr, and it negotiated a peace.

So if in April 2003 the problem in Iraq was that there was nobody in charge, today the problem is there are too many people who could arguably be in charge. The United States could arguably be described as in charge, the Iraqi government could arguably be described as in charge, and the militias in some sense could arguably be described as in charge. Now whether that's a question of anarchy or not is a question I'm going to turn to in a moment. But I want now to turn to a little bit of philosophical discussion to try to make sense of these two different situations, and then I'll come back to practical realities in Iraq, and conclude by actually addressing the question of how withdrawal can or might begin to give way to some sort of organized political authority in Iraq that improves upon the situation that presently exists.

When I went off to Iraq, I, like a lot of Americans—especially American lawyers, but probably Americans generally—was deeply, if in some ways unconsciously, influenced by a philosophical picture of how governments come into existence associated with the philosopher John Locke. The reason that Locke is so influential in the United States is that the Founding Fathers of the United States found Locke to be an enormously useful philosopher for them—almost unimaginably useful. Now why was he so useful? Why did it seem to them that he had almost been created for them? Because he offered, among other things,

an account of how people—there are many reasons that he was useful but this is just one version—he offered, among other things, an account of how people might justifiably break their bonds of relationship to one sovereign, then come together by consent and form themselves through contract into a new sovereign power. Oddly enough, that's just what they were going to do themselves. I think they might have done it even absent John Locke, but they treated Locke's work as though it were a kind of handbook.

Now this is a troubling thing for contemporary philosophers who study Locke, because although the Founding Fathers were deeply intrigued by the idea of "the state of nature,"—not an idea that Locke invented, but an idea that Locke used very effectively in his account of how you can do these things—contemporary philosophers reading Locke closely make the fair, and I think true observation, that in Locke's view it's not necessary for the "state of nature" ever to have existed. In fact, Locke is using the "state of nature" as a kind of teaching tool; a kind of hypothetical example, you might say. When we law professors dream up these hypotheticals for a living, we don't actually think they've happened. If they had happened, if we thought they'd happened, they wouldn't be hypotheticals. Locke dreamt up this "state of nature," or other philosophers before him dreamt up this "state of nature," in order to make an argument about what justifies or legitimates political authority. And though he did say when pressed himself in his own works that the "state of nature" really had existed, contemporary philosophers tend to raise their eyebrows at that formulation. They say, "Oh come on. He didn't *really* mean that it had *really* existed." And yet it was precisely the existence of this idea of a "state of nature" where you dissolved one government, enter into the "state of nature" and then were free to form a new one that so appealed to the Founding Fathers.

So what? Who cares about this little excursion into the history of the Founding Fathers? Well the reason that it mattered in the real world in Iraq is that we Americans are so influenced even subconsciously by this story, this philosophical story, because of its connection to our own constitutional history. When we thought about what a constitutional process might look like in Iraq, our imaginings went something like this: (1) conquer a country; and (2) get rid of the very bad man in charge of the country. And once he's gone, what happens? Well, people go back to the "state of nature." And what happens when they're in the "state of nature"?

They all sit down together nicely. They realize that it's in their self interest to form themselves into an effective polity that respects rights, because otherwise they would be in a bad situation. And so they ought to be allowed to form a new government more or less spontaneously.

You're laughing because this sounds absurd, but Ambassador Istrabadi and I were both at a meeting in the very end of April of 2003 in which the representatives of the U.S. government got together what they thought was a collection of Iraqi notables. They were an odd group of people in that some people were well represented, others were overrepresented, others underrepresented, but nevertheless it was a group of people of influence in the country. And they were told by American officials present, "We're just doing reconstruction; you're in charge of government." And this meeting, which was incomprehensible I think to most of the Iraqis present, would have been unimaginable absent this kind of background idea of what Locke stands for. So, when I say Lockean, I don't mean necessarily Locke's own views. I'm talking now about an idea sort of associated with the philosopher John Locke.

Now this was a terrible idea, I think it's fair to say. And notice in passing, just a foreshadow of this afternoon's panels, that from a legal standpoint, from an international law standpoint, it also didn't really have a basis in at least presently existing notions of the law of occupation. There are those who try to argue that you could imagine that after the destruction of an existing state, the state could utterly cease to exist and then be reconstructed from scratch; but even that is a tendentious and minority position in international law. The standard view is that someone has sovereignty at all times. Once the conqueror has removed sovereignty from the existing ruler, the conqueror has at least some sort of temporary sovereignty—you might call it trusteeship—and has certain responsibilities that come with that. Now this is made more complicated by the idea of popular sovereignty, because if it's the Iraqi people who have sovereignty then you have to tell the story a little differently. Then you say the Iraqi people were always sovereign, and the United States simply came to remove one government, never touching Iraqi sovereignty. This would be one version of the story. And then, the United States is simply assisting the Iraqis in reestablishing their own sovereignty. Sovereignty is always a fiction but that takes it to

a fictional level that's really difficult to sustain. So I think that's probably not the most useful way of thinking about it. But the key point I want to make is that international law does not have the view that was the view that was broadly imagined by the U.S. government. And I will add as well that most of the relevant officials in the U.S. government were wholly ignorant of what international law even said about the topic. And at no point subsequently have they tried to educate themselves on this.

This odd Lockean picture, which I myself also shared, could be supplemented by comparison to another important philosophical figure, a precursor of Locke's. And that's the philosopher Thomas Hobbes. Now Hobbes is one of the most vexed topics that you could imagine in political theory because on a certain level his views look rather similar to Locke's, and Locke was in certain ways indebted to him. In other ways they look radically different from Locke's, utterly different from Locke's. The big difference between the two almost always rests in their conclusions rather than the way they reason to the conclusions. That's a crude characterization but it'll have to stand for the moment. Hobbes' perspective on this question is one that Professor Waldron alluded to this morning, and which indirectly Professor Coleman³ also alluded to, and I just want to talk about it for just a moment. First I want to talk about Hobbes' view on the difference between war and peace. Because as Professor Coleman mentioned this morning, a very important desideratum for us in having all the conversations we're having is to figure out what is war and what is peace. Hobbes had a very distinctive definition of both. In the case of war he said, "War is the state that exists when there is no effective sovereign." And to him an effective sovereign was an absolute sovereign. A sovereign who was wholly obeyed. Or who would be able to punish those who failed to obey. And he said that insofar as there was no effective sovereign, you were at war. That was his definition of war. He added that you didn't have to have actual fighting to be at war. War is a time continuum in which people are inclined to go to battle to resolve their difficulties. He actually—this is sort of humorous but he was English so it makes some sense—he says that it's like bad weather. War is like bad weather. When you say we're having bad weather,

3. Professor Jules Coleman, Wesley Newcomb Hohfeld Professor of Jurisprudence and Professor of Philosophy, Yale Law School, was a panelist on Panel One, "Moral Obligations of an Occupier to Occupied." *Id.*

you don't just mean that right this moment it's raining. (This is the worst analogy imaginable in Los Angeles, I realize now. As I say this and look out the window. So you may not know what I'm talking about now. There's this thing called bad weather.) And he says when we say we're having bad weather, what we mean is that we're having bad weather over the course of several days; not that it's raining all the time. And similarly, he says war does not mean that you're constantly fighting at every moment; it means that you're in a state where the inclination to fight remains there. So that's his definition of war. And then he's got a punch line where he says, "Any other state is peace." So peace is anything that's not war. This would not satisfy Professor Coleman's call to us to have a more nuanced and complex vision of what counts as peace.

The reason I think that Hobbes offers this vision is that—and it's associated as you all know with his very bleak vision of what human nature is like—his idea that if you leave people without any absolute sovereign, what they will do is go to war with each other. What they will do is struggle with each other. What they will do is try to gain advantage or eminence over one another. That they will never stop doing this until some sovereign stops them from doing so. He wants us to accept that we need the sovereign, and in effect, he's saying when you have that sovereign in place, that's peace. You cannot even have peace until you have this sovereign with absolute authority. He furthermore thinks that the only way you can talk about justice is when you have a sovereign in place already. When people are fighting each other in this way, as they do in a state of war, he says it's not even meaningful to talk about the relationship between just and unjust, what's mine and what's yours; the stuff that we do in law school all the time. He says that's not meaningful absent a state. And what is a state? A state is a functioning sovereign of absolute power who can stop people from killing each other.

Now you can probably see where this is going, and this is why Hobbes is less popular, and was certainly not popular to our Founding Fathers. In Hobbes' view this justified a picture in which the sovereign had essentially absolute authority over everything in the society. You think you have a right to free speech? Not according to Hobbes. The sovereign has the absolute right to control opinion, because opinion could be harmful to absolute power and control. But notice that part of what's driving Hobbes' view is this deep fear of what happens when order breaks down.

That is in some way resonant with the medieval Muslim adage that I mentioned to you before. And on the question of whether there was ever such a state of war of all against all, Hobbes is even more equivocal than Locke. He says, "I don't even claim that this ever existed universally in the past." But he says—and I think this is very telling—"you can see what I'm talking about from cases of civil war." He says, "you can see what I'm talking about when you have a state, an absolute all powerful state." Note from me: like Iraq, where in fact Saddam was an absolutist ruler. Where he limited all forms of free expression. Where you couldn't do anything without his authority. Under those circumstances Hobbes says when that breaks down and you have civil war, then he says, you'll see what I'm talking about when I talk about the war of all against all.

Now again like most Americans, I didn't think that this picture corresponded very closely to the real world as I was likely to encounter it before I went to Iraq. Now I think somewhat differently. Now certainly, and heaven forbid that it should be otherwise, I don't accept Hobbes' conclusions about the justifiability of absolutism. But there is one feature of Hobbes' argument that I'm at least, more sympathetic to now than I ever imagined that I could be, and I'm going to mention that and then I'm going to turn to the question of how we could actually get out of Iraq functionally. And it's this: it's Hobbes' idea that absent some functioning state, you cannot really imagine the construction or the effective functioning of society. Absent a state where some entity is in charge—and let's call it a just constitutional government rather than an absolutist monarch—absent somebody in charge, the conditions for the structuring of a functioning society are all but impossible to maintain and to achieve. And I mean this in very practical terms. What I mean is that at the moment, in 2003 when the United States effectively projected anarchy over Iraq, it raised the degree of difficulty of the subsequent construction by Iraqis of a functioning state to a point that makes it almost unimaginable that they or any other people could successfully accomplish it. We made it so difficult for people to reconstruct themselves into functioning politics because we allowed that moment when nobody was in charge.

Now compare a scenario where we had insisted, for example, that *we* were in charge. We could have done this, by the way, wholly unjustly or wholly justly according to Hobbes. This is

another point that grows out of Professor Waldron's comments this morning. Professor Waldron urged us to look at the difference between Locke and Hobbes' views on the question of government by conquest. Now Locke—the nice good appealing Locke whom we all love—says that if you've had a conquest unjustly, you can never have legitimate authority. If it's born in sin, forget about it. If you conquer unjustly you're just like a pirate. And it's not as though over time the pirate's rule is somehow going to become legitimate. It's always going to be unjust. Hobbes says no such thing. From his view that there has to be an absolute sovereign, and that you can't have conditions which count as justice in the absence of that sovereign, he thinks that it doesn't matter whether the person who conquers does so justly or unjustly, has a good cause or doesn't have a good cause. Once that sovereign is in charge, he's just as authorized to rule over you as would be a wholly just government. That's a remarkable thing for him to say.

Again, it seems intuitively, terribly unappealing. But just imagine for a moment a scenario. Assume for the sake of argument that we invaded Iraq unjustly. Nevertheless you could imagine that if we had announced that we were actually in charge; if we had projected power and said that we were effectively in charge, and then had said and we intend not to be in charge at some relatively soon future date, then Iraqis who recognized the reality of our political authority—not its justice but its reality—might have had the inclination to begin immediately trying to develop the kinds of political institutions that would enable them to govern themselves effectively once we were no longer in charge. Now that would not have been true of everybody. It certainly would not have been true of people who were so deeply committed to the thought that injustice can never justify government, that they were inclined to go to war against us.

But what I want to suggest to you here—and this is not a philosophical point, but a practical one—is that I think there would have been many fewer Iraqis who would have taken up arms against the United States on purely principled grounds under those circumstances, though they might have been justified in doing it, than actually did take arms up against us when they got the message that we weren't actually capable or interested in limiting them from doing so. As it was, it took the insurgency months to develop. My view as to why is that ordinary people in Iraq—even those who hated us and were sure that our coming was

unlawful and illegitimate—thought we probably were going to manage to take control. They were shocked by our inability to control things, shocked by the looting, but they said, oh come on, these guys will pull it together somehow, they're the United States of America. And it was when we didn't—when we essentially opened the door to competing centers of political authority or let's say military authority or guns, people with guns on the streets—that they stepped up and took advantage. So ironically, it was our tenderness of mind and heart, our desire not to declare ourselves to be absolutely in charge—although eventually the United States did identify itself as an occupier under international law—it was our desire to insist that we were in fact not in charge of politics in the country that opened the door to the anarchic situation, which opened the possibility of new centers of military power emerging in the country, namely the militias.

With that I now want to turn to the present situation and what, if anything, this philosophical background might suggest about how we get out of it. I said a few minutes ago that if at the beginning, the difficulty is that nobody was in charge, that now the problem is that there are too many competing centers of authority in Iraq. Three by my count. More if you count each militia as a separate one, then it could be dozens. The question that faces Iraq now is, as the United States presence gradually declines—which I think after the next presidential election it's likely to, regardless of who's elected—can Iraq transform the hodgepodge system of *de facto* government that exists across the country into something that looks more like a single functioning government? It has two twin challenges there. The first is, as the United States withdraws its force and becomes less of a power in the country, can the government fill in where the United States is withdrawing? Everyone agrees that that's a necessity, an absolutely necessity of successful reconstruction in Iraq. Everyone agrees that it should be a high priority for the United States. And I think most people agree . . . maybe I'm wrong about this, but I think that most people agree that it's not happening so far. I think that what's happened in the last couple weeks in Basra suggests that is still the case. By that I simply mean that the Iraqi military and security forces are still not anywhere near at the level of strength they would need to be to actually exert a monopoly of legitimate force in the country. If they can't decisively beat the Mahdi Army on their own, then they can't govern the country. That's a serious and major challenge

and I simply want to point to that. It shows you that the *de facto* occupation that the United States is engaged in actually has some benefits for the local government. Because to the extent that government claims to be sovereign and is to tell people what to do, it's only able to do it because the United States is behind it. That's an irony and a difficulty that is going to mark any question of United States withdrawal and the transfer of legitimate *de facto* authority to the Iraqi government.

The second is that where the Iraqi government chooses as a practical matter to share power with non-governmental players, and there's a mixed and complex shared power, the challenge for the new Iraqi government going forward will be for those structures to acknowledge formally that they belong under the aegis of the Iraqi government. Now whether they'll do that or not is an open question. I'm not here to tell you that they will or they won't, but I am here to say that that is the most important challenge from the standpoint of the Iraqi government. Forget about eliminating those local players as actual power centers. We're stuck with that now. We're stuck with that for at least the next five or ten years. What I'm saying is in the best case scenario, those local players, the local militias, local sheiks, who have control over a certain number of men at arms, they have to acknowledge themselves as part of the Iraqi governing structure so that it can fairly be said that the government is in charge and that they're not in charge.

Now oddly, that process whereby they have to enter into this kind of agreement looks strangely Lockean. It looks strangely like the process of people agreeing relatively calmly to enter into circumstances where they will consider themselves part of a new government. But what I want to suggest—and this is my punch line—is that there is no way for that negotiated process to happen absent a power in the country militarily capable of limiting them. I want to suggest that there has to be a centralized power coming from the state, a military power from the state, capable of subduing them in order for them actually to have the freedom, as it were—although I mean that ironically—to enter into an agreement to be governed by part of the central government.

Let me just explain what I mean and then I'll be quiet and open it up for questions. Consider what just happened in Basra. To the extent that the Mahdi Army showed that it could hold off the central government, the deal that it strikes with the central

government for how Basra will actually be governed is not going to be conducive to its entrance into a national government, because it's based on the Mahdi Army's ability to use military force against the government. So even if they say, "Oh we're part of the government," they won't really be. They'll be much like Hobbes' state of war. They will be in the time continuum of battle. They will be inclined towards battle whenever it's called for. For it to be the case that they were actually entering into a central government, I believe the government would have to be able to beat them—wouldn't have to actually beat them; it would have to make a credible case that it *could* beat them. And we're certainly not there yet. The question of whether Iraq will turn into a place where a Hobbesian civil war will continue, or a place where some sort of Lockean consensus will build itself into a functioning government, is going to depend ultimately on the question of whether the central government is able, on its own and with American help, to generate the kinds of security forces that could actually control the country. I think that's actually the baseline necessity without which we will not have success in Iraq.

And so on the key questions—what do we owe Iraq and when should we leave?—I'll just give you one line answers to both. United States owes to Iraq to leave Iraq in a state wherein Iraqis are capable of effective self-government. When should we leave? The answer is, we should leave as soon as it is either clear that the Iraqi government is able effectively to govern, or it is clear that the Iraqi government will never be able to govern. That last scenario is a scary one. It worries me deeply. I don't want to say, however, that it would never come into existence. You could imagine a scenario where all has been tried and it can't happen and that we therefore have to leave. I think we'll know the answer to that last question if, and when the Iraqi public tells the United States now it's time to go. The Iraqi political institutions are not yet capable of self-government in a true and effective way, but what they are capable of is expressing the preferences and the desires of the Iraqi people. They're actually pretty good at that. At that moment the Iraqi government says it's time to go then we'll have to. Thank you for listening, and I'm eager to hear questions and challenges.

